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Supreme Court, U.S.
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No. 02-1215

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO SUPPLEMENTAL BRIEF OF FEDERAL ENERGY REGULATORY COMMISSION

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September 15, 2003

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We urge the Court to reject the argument of Respondent Federal Energy Regulatory Commission ("FERC") that its August 14, 2003 issuance of a Notice of Public Conference "provides a further reason for the Court to deny certiorari" (Supp. Br. 4).

1. FERC's announced conference, scheduled for September 23, 2003, is said to be designed "to explore whether the Commission should reformulate its test for defining non-jurisdictional gathering in the shallow waters of the Outer Continental Shelf and, if so, what the new test should be" (Supp. Br. 2). That conference should not affect the Court's consideration of this petition. There is no assurance whatsoever—and indeed FERC has offered none—that the conference will lead to any change in FERC's central point of

aggregation test enunciated in the *Sea Robin* orders below, or that, even if FERC were to adopt a new test, it would comport with this Court's ruling in *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

2. Producers and other shippers on OCS pipelines went through a similar drill a year ago when FERC convened a public conference on October 25, 2002 on natural gas markets in Docket No. PL02-9, which included an examination of FERC's "offshore gathering policy" as one of the highlighted items. Despite receiving statements of position from all sectors of the industry, presentations by a panel of six witnesses (including representatives of most of the parties to this case) and post-conference written comments, in which no participant supported the FERC's central point of aggregation test, the FERC has taken no action to alter that test. Thus, the FERC's recitation in its August 14 Notice of the shortcomings of its current jurisdictional test and of the need to reconsider its definition of the end point of gathering on the OCS (Supp. Br. 2-3) is hardly a new phenomenon. Without an actual order establishing a new gathering test, FERC's statements of desire to "explore" the issue, like its statements in Docket No. PL02-9, are of no legal consequence.[1]

3. An agency should not be able to evade this Court's review simply by announcing, while a petition is pending, an intent possibly to rethink the decision for which review is sought. Instead, if FERC has lost confidence in its central point of aggregation test, it must muster a majority vote to

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[1] Because no OCS jurisdictional cases are now pending before the agency, the most the public conference might produce (if it produced anything) would be a non-binding, non-reviewable policy statement, unless FERC were to reopen the *Sea Robin* and *Transco* cases (Nos. 02-1215, -1265, 03-147 and *Shell Offshore, Inc. v. FERC*, No. 03-__(filed Sept. 15, 2003)) now pending in this Court.

change the test to conform to *Northern Natural*. Not having done so, its orders and the decision of the Court of Appeals affirming them warrant review by this Court.[2]

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[2] We and the petitioners in No. 02-1265, which also involves review of *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"), have asked the Court to defer consideration of the petitions regarding *ExxonMobil* until the conference at which the Court takes up the related petitions (No. 03-147 and *Shell Offshore, Inc. v. FERC*, No. 03-___ (filed Sept. 15, 2003)), seeking review of *Williams Gas Processing—Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) ("*Williams*"), an OCS jurisdictional case that relied heavily on *ExxonMobil*. The *ExxonMobil* and *Williams* petitions present the same issues for review and are complementary, warranting in tandem consideration. The FERC did not oppose our July 25, 2003 request for in tandem consideration.